

STATE OF MICHIGAN
COURT OF APPEALS

VEDA REGAN,

Plaintiff-Appellant,

v

STEVEN SUCHOWOLEC, Individually and as
Personal Representative of the ESTATE OF
PAMELA SUCHOWOLEC,

Defendants-Appellees.

UNPUBLISHED

January 8, 2009

No. 281184

Kent Circuit Court

LC No. 05-012729-NI

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's judgment of no cause of action in favor of defendants in this automobile negligence claim, entered after a jury trial. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On December 24, 2004, plaintiff was involved in an automobile accident with defendant Pamela Suchowolec (defendant). Plaintiff subsequently began treatment with her family physician for neck pain. She also began experiencing left shoulder pain, and was referred to Dr. William Schwab. He performed arthroscopic surgery on plaintiff in June of 2005, and repaired a labrum tear in plaintiff's left shoulder and a tear in her subscapularis muscle. Plaintiff underwent physical therapy, but continued to have pain and a limitation in her range of motion. Additional surgery was performed on November 16, 2005. At that time, the labrum and the subscapularis looked "satisfactory," but Dr. Schwab noticed inflammation in plaintiff's shoulder synovial membrane and some prominence in the acromion part of plaintiff's scapula. Dr. Schwab shaved a portion of plaintiff's acromion. After the second surgery, plaintiff appeared to heal without complications, but she continued to have shoulder pain.

After reviewing the evidence presented, which included testimony concerning plaintiff's past and present symptoms, her ability to work in the future, and the impact of her injury on the remainder of her life activities, a majority of the jurors found that plaintiff's injury did not result in a serious impairment of a body function.

On appeal, plaintiff argues that the trial court erred by refusing to grant her a directed verdict. Plaintiff argues that there was no evidence presented that could lead a reasonable juror

to conclude that her injuries did not meet the serious impairment of body function threshold, and thus, the trial court erred when it denied her motion for a directed verdict. We disagree.

A trial court's ruling on a motion for a directed verdict is reviewed de novo. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005). When reviewing the trial court's decision, the evidence and all legitimate inferences are examined in the light most favorable to the nonmoving party. *Id.* We review the evidence presented up to the time of the motion and resolve any conflict in the evidence in favor of the nonmoving party to determine if a question of fact is presented. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). "A directed verdict is appropriate only when no factual question exists regarding which reasonable minds may differ." *Id.* See also *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 680; 645 NW2d 287 (2001). The threshold for granting a directed verdict is high, but is not meant to be insurmountable. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 410; 617 NW2d 543 (2000). However, in general, "[o]ur courts are 'reluctant to overturn a jury's verdict' where there is 'ample evidence' to support the jury's decision, . . . and will do so only where we are satisfied that allowing the verdict to stand would be inconsistent with substantial justice." *Clark v K-Mart Corp*, 249 Mich App 141, 150; 640 NW2d 892 (2002), quoting in part *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001).

Pursuant to MCL 500.3135, a person is subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. A "serious impairment of body function" is "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7).

Under *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the reviewing court is to determine whether a factual dispute exists "concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function." *Id.* at 131-132. If there are material factual disputes, a court may not decide the issue as a matter of law. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, the question is one of law. *Id.* at 132.

When a court decides the issue as a matter of law, it must then proceed to the second step in the analysis and determine whether "an 'important body function' of the plaintiff has been impaired." *Id.* When a court finds an objectively manifested impairment of an important body function, "it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.* This process involves an examination of the plaintiff's life before and after the accident. The court should objectively determine whether any change in lifestyle "has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.* at 132-133. "Merely 'any effect' on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life." *Id.* at 133. The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. These factors include:

(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. *Id.*

In addition, “[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person’s overall life.” *Id.* at 131. Thus, where limitations on sporting activities “might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function.” *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005). However, “a negative effect on a particular aspect of an injured person’s life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life.” *Kreiner, supra* at 137.

Specifically in regard to residual impairments, the *Kreiner* Court noted, “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.” *Id.* at 133 n 17. However, this Court has held that, “[t]he necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment.” *McDaniel v Hemker*, 268 Mich App 269, 283-284; 707 NW2d 211 (2005). A physician need not offer a medically identifiable or physiological basis for imposing restrictions based on pain; however, a recitation of a physiological basis provides support for the conclusion that the restrictions are physician-imposed, rather than self-imposed. *Id.* at 284. In addition, this Court has recognized the difference between self-imposed limitations due to pain, and self-imposed limitations based on physical inability, which can support a finding that the plaintiff has suffered a threshold injury. *Id.* at 283-284.

We agree with the trial court’s assessment as to whether plaintiff had presented sufficient evidence that, as a matter of law, she had suffered a threshold injury. Her expert witnesses testified that, as a result of the accident, plaintiff’s shoulder and neck were injured. The witnesses’ testimony also tied the injuries to the accident, at least to an extent that they created a question of fact for the jury to resolve. The injuries were objectively manifested, as shown through presented MRI results, and the evidence of surgical interventions. The injuries also involved an important body function, namely the restricted use of plaintiff’s left arm.

However, the question of whether the injuries affected plaintiff’s ability to lead her normal life was not one that was appropriate for a finding as a matter of law. Plaintiff’s motion involved credibility issues, particularly with respect to the level of pain that she maintained she continued to suffer, and its limitation on her activities. This is especially true given Dr. Schwab’s testimony about the apparent lack of an obvious physiological basis for her continued pain. In addition, plaintiff’s own expert witnesses offered conflicting testimony about her future ability to work, and in what capacity. There was a material factual dispute regarding the nature and extent of the plaintiff’s injuries. The trial court thus properly found this question to be one for the jury to determine. See *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999) (questions of credibility are for the trier of fact to resolve); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996) (it is the factfinder’s

responsibility to determine the credibility of trial testimony). The trial court did not err by denying plaintiff's motion for a directed verdict.

Affirmed.

/s/ Brian K. Zahra

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood